

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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JOSE C. CARBAJAL, *on behalf of himself and all  
other similarly situated individuals,*

Plaintiff,

**ORDER**

18-CV-7070 (MKB) (SB)

v.

MILLER BROS. LANDSCAPE MAINTENANCE,  
LLC, SCOTT MILLER LANDSCAPE  
MAINTENANCE, INC., SCOTT W. MILLER,  
EDWARD A. MILLER, and ROSE MARIE  
MILLER,

Defendants.

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MARGO K. BRODIE, United States District Judge:

Plaintiff Jose C. Carbajal commenced the above-captioned action on behalf of himself and all other similarly situated individuals against Miller Bros. Landscape Maintenance, LLC, Scott Miller Landscape Maintenance, Inc., Scott W. Miller, Edward A. Miller, and Rose Marie Miller (collectively, “Defendants”). (Compl., Docket Entry No. 1.) Plaintiff alleges that Defendants failed to pay him overtime and minimum wage in violation of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*, (“FLSA”) and state labor laws. (*Id.*) Plaintiff filed an Amended Complaint on March 5, 2019. (Am. Compl., Docket Entry No. 8.)

On May 13, 2019, Plaintiff notified the Court that he does not intend to pursue the lawsuit against Defendants, (*see* Letter dated May 13, 2019, Docket Entry No. 16), and on May 28, 2019, Plaintiff moved pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure to voluntarily dismiss the Amended Complaint, (“Plaintiff’s Motion to Dismiss”). (Pl. Mot. to Dismiss, Docket Entry No. 18.) On June 5, 2019, Defendants opposed the motion in part, seeking a dismissal with prejudice. (*See* Letter dated June 5, 2019, Docket Entry No. 19.) On

August 29, 2019, the Court referred the motion to Magistrate Judge Sanket J. Bulsara. (Order dated August 29, 2019.) By report and recommendation dated January 3, 2019, Judge Bulsara recommended that the Court dismiss the Amended Complaint without prejudice (“R&R”). (R&R, Docket Entry No. 22.) Judge Bulsara applied both the plain legal prejudice test and the *Zagano v. Fordham Univ.*, 900 F.2d 12 (2d Cir. 1990) factors to determine whether the action should be dismissed with prejudice. (*Id.* at 6) In applying the plain legal prejudice test, Judge Bulsara found that Defendants have not “demonstrated any plain legal prejudice flowing from a without-prejudice dismissal.” (*Id.* at 7–9.) In applying the *Zagano* factors, Judge Bulsara concluded that a dismissal with prejudice is not justified. (*Id.* at 9.)

No party has opposed the R&R and the time for doing so has passed.

A district court reviewing a magistrate judge’s recommended ruling “may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C). “Where parties receive clear notice of the consequences, failure to timely object to a magistrate’s report and recommendation operates as a waiver of further judicial review of the magistrate’s decision.” *Smith v. Campbell*, 782 F.3d 93, 102 (2d Cir. 2015) (quoting *Mario v. P&C Food Markets, Inc.*, 313 F. 3d 758, 766 (2d Cir. 2002) (citing *Small v. Sec’y of Health & Human Servs.*, 892 F. 2d 15, 16 (2d Cir. 1989) (per curiam))); *see also Sepe v. N.Y. State Ins. Fund*, 466 F. App’x 49, 50 (2d Cir. 2012) (quoting *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997)); *see also Almonte v. Suffolk Cty.*, 531 F. App’x 107, 109 (2d Cir. 2013) (“As a rule, a party’s failure to object to any purported error or omission in a magistrate judge’s report waives further judicial review of the point.” (quoting *Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003))); *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010) (“[A] party waives appellate

review of a decision in a magistrate judge's [r]eport and [r]ecommendation if the party fails to file timely objections designating the particular issue." (citations omitted)).

The Court has reviewed the unopposed R&R, and finding no clear error, adopts the R&R in its entirety pursuant to 28 U.S.C. § 636(b)(1). Accordingly, the Court dismisses the Amended Complaint without prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. The Clerk of Court is directed to close the case.

Dated: February 5, 2020  
Brooklyn, New York

SO ORDERED:

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MARGO K. BRODIE  
United States District Judge